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Delving Into the Details of Prior Convictions: The New Louisiana Rule

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even by using prior convictions.[54] Moreover, the psychological advantage of a defendant's testimony, now protected by a limited scope of cross-examination, arises only with a defendant who is a good witness. Thus the primary factors that contribute to the general reluctance for a defendant to testify at trial remain, and the limitation upon the scope of cross-examination applies only for a limited purpose, the denial of the voluntariness of an already incriminating confession. In short, despite the extended protection afforded defendants, prosecutors should not be unduly constrained by the *Lovett* decision.

Stephen H. Vogt

DELVING INTO THE DETAILS OF PRIOR CONVICTIONS: THE NEW LOUISIANA RULE

Four recent Louisiana cases have held that a cross-examiner may properly go into details of prior convictions being used for impeachment. In the parent case, *State v. Jackson*,[1] the defendant was charged with armed robbery. When the principal defense witness took the stand to testify, he was cross-examined over objection on a prior conviction. While asking questions about his conviction for armed robbery, the prosecutor inquired into a rape which occurred during the course of the prior robbery. The court overruled previous Louisiana jurisprudence[2] and held that cross-examination concerning the rape was proper to show the details of the crime underlying the conviction as tending to establish the "true nature" of the conviction. Following *Jackson*, a unanimous court in *State v. Elam*[3] found that the trial court had not committed reversible error by permitting the prosecution to examine a defendant-witness on the details of his prior convictions. These decisions were reaffirmed by a sharply divided court in *State v. Williams*[4] and in a later *State v. Jackson*.[5]

One common method of impeaching a witness is by prior convic-

54. *Id.*

1. 307 So. 2d 604 (La. 1975) [referred to hereafter in text as "Jackson I"].
2. *Id.* at 606.
3. 312 So. 2d 318 (La. 1975).
4. 339 So. 2d 728 (La. 1976).
5. 339 So. 2d 730 (La. 1976).

tions.[6] Prior convictions are considered relevant because a witness who has demonstrated a past willingness to disregard societal values is deemed more likely to violate his oath on the stand.[7] At common law a witness convicted of treason, a felony, or a "crime falsi" was incompetent to testify.[8] Traitors and felons were considered incompetent because they had been convicted of capital offenses which rendered them unworthy of life and thus unworthy of belief in court.[9] The category of "crime falsi" included not only crimes bearing directly on veracity, but also crimes against the administration of justice such as suppression of testimony by bribery.[10] Although the incapacity to testify has been removed by statute in almost all jurisdictions,[11] the credibility defect for all three types of crime has endured.[12]

Convictions form an exception to exclusionary rules regarding past acts of misconduct.[13] Generally, proof of specific instances of conduct is impermissible because of the dangers of confusion of issues and unfair surprise.[14] An exception to this exclusionary rule occurs when evidence of past acts of misconduct is offered to show knowledge, intent, or system.[15] A further exception to the rule involves the use of convictions to impeach a witness on the stand. This exception is most often justified on the grounds that proof of a conviction is easily made, that the number of

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6. LA. R.S. 15:495 (Supp. 1952) provides in part: "Evidence of conviction of crime . . . is admissible for the purpose of impeaching the credibility of the witness . . . ." For other methods, *see* LA. R.S. 15:490 (1950) (general attack via reputation for truth or moral character); LA. R.S. 15:492 (1950) (bias, interest and corruption).

7. 10 MOORE'S FEDERAL PRACTICE § 609.01 [1.-3], at VI-100 (2d ed. 1976) ("Advisory Committee's Note to 1969 Draft") (the Committee used this rationale to suggest using felonies in addition to crimes bearing directly on veracity).

8. S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 373, at 513 (16th ed. 1898).

9. *Id.* § 373, at 513-14.

10. *Id.* § 373, at 514-15.

11. C. MCCORMICK, EVIDENCE § 43, at 85 (Cleary ed. 1972); *see, e.g.*, LA. R.S.15:461 (1950) which provides in part: "The competent witness in any criminal proceeding . . . shall be a person of proper understanding."

12. *See, e.g.*, FED. R. EVID. 609; *see also* State v. Odom, 273 So. 2d 261 (La. 1973) (any crime may be used for impeachment).

13. 3A J. WIGMORE, EVIDENCE §§ 979, 980 (J. Chadbourn rev. ed. 1970); *see* 10 MOORE'S FEDERAL PRACTICE 609.01 [1.-3], at VI-100 (2d ed. 1976) ("Advisory Committee's Note to 1958 Draft") ("The reasons for excluding specific instances of conduct as a means of impeachment do not justify exclusion when the evidence takes the form of conviction of a crime. Dangers of unfair prejudice, confusion of issues, misleading the jury, waste of time, and surprise tend to disappear or diminish.")

14. 10 MOORE'S FEDERAL PRACTICE § 609.01 [1.-3], at VI-100 (2d ed. 1976).

15. *See* LA. R.S. 15:446 (1950); State v. Prieur, 277 So. 2d 126 (La. 1973).

acts of misconduct provable in this manner is small, and that the judgment cannot be reopened to raise new issues.[16] Both exceptions are usually carefully circumscribed by the courts under the general principle that the law should not rake "into men's course of life, to pick up evidence that they cannot be prepared to answer."[17]

The admission of prior crimes to impeach an accused who takes the stand in his own defense raises problems somewhat different from those met when an ordinary witness is impeached by his prior offenses. Applied to defendant-witnesses, impeachment by convictions presents serious dangers to a fair trial.[18] The relevance to credibility cannot be substantially doubted,[19] but it is this almost indisputable relevance that tends to imperil a defendant. Convictions may be given too much weight by juries who might decide that the defendant, having committed crimes in the past, is a character likely to have committed the crime at issue. As one court put it, "juries are inclined to act from impulse, and to convict parties accused, upon general principles."[20] Thus the defendant has what McCormick calls "a grievous dilemma"—he can refrain from testifying and risk the jury's considering his silence against him, or testify and take the chance that his record will muddy the presumption of innocence.[21]

Recognizing the sensitive position of defendants, England adopted a provision shielding defendants from impeachment by convictions when the Criminal Evidence Act of 1898 removed their incompetence to testify in their own defense. The Act provided that a defendant could be impeached with his criminal record only if he opened the door to his good

16. 3A J. WIGMORE, *supra* note 13, § 980 at 828.

17. Hampden's Trial, 9 How. St. Tr. 1053, 1103 (1684).

18. 1 J. WIGMORE, *supra* note 13, § 194; Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184 (1940).

19. *But see* Glick, *Impeachment by Prior Convictions: A Critique of Rule 6-09 of the Proposed Rules of Guidance for U.S. District Courts*, 6 CRIM. L. BULL. 330, 335 (1970), questioning the maxim that there exists a positive relationship between criminal convictions and a person's willingness to tell the truth. Glick finds a logical fallacy in this principle, as demonstrated by the following hypothetical situations: "(1) A calls B a liar. B prizes his reputation for honesty so highly he assaults B [sic] and kills him. A [sic] is convicted of manslaughter and is sentenced to 5 years imprisonment. (2) X has accumulated 40 traffic tickets and has repeatedly ignored summonses to appear in court. He is sentenced to 30 days." *Id.* at 335. In many courts B is subject to impeachment and X is not.

20. State v. Saunders, 14 Or. 300, 309, 12 P. 441, 445 (1886).

21. C. MCCORMICK, EVIDENCE, *supra* note 11, at 89; Ladd, *supra* note 18, at 184 (the accused is not like ordinary witnesses because of his dual position—he must take into account the question of proving his innocence to the crime charged as well as the dangers he will expose himself to by taking the stand in the face of evidence the prosecution may use to discredit his testimony).

character or impugned the character of the prosecution witness.[22] The redactors of the Federal Rules of Evidence found another solution to the problem by requiring the judge to determine whether the probative value of the conviction as impeachment evidence outweighs the prejudice to the defendant before a felony conviction can be used against *any* witness.[23] Others can find no adequate safequards, and for this reason the

22. Since 1865 England has permitted impeachment by convictions of any witness. The Criminal Procedure Act, 1865, 105 Statutes at Large 32, ch. 18, § 6 provided in part: "A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction . . . ." Then, in 1898, The Criminal Evidence Act, 1898, 35 The Law Reports—Statutes, ch. 36, § 1(f) was adopted, providing in part:

> Every person charged with an offense . . . shall be a competent witness for the defense . . . . Provided as follows: . . . (f) A person charged and called as a witness . . . shall not be asked . . . any question tending to show that he has committed or been convicted of . . . any offenses other than that wherewith he is charged . . . unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character . . . or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . . .

The principal effect of section 1(f) is to provide the accused with a shield which is only thrown away if he gives evidence of his good character or casts imputations on the prosecutor or the witness for the prosecution. When the shield is thrown away, the accused is liable to be cross-examined on his criminal record. *See* CROSS, ON EVIDENCE, 353-79 (4th ed. 1974). The English courts recognize that once revealed to a jury, the record of convictions causes unfair prejudice to an accused; therefore, the judge may always exclude record of a defendant's prior convictions if the probative value fails to outweigh prejudicial effect. *See* Maxwell v. Director of Pub. Prosecutions, [1935] A.C. 309 (H.L. 1934). In interpreting section 1(f), the courts have not lightly thrown away this shield. Rex v. Redd, [1923] 1 K.B. 104 (1922) (charge of housebreaking; a witness for the defense volunteered a statement on the defendant's good character, but the court held that the door was not open to evidence of the defendant's criminal record); Stratton's Case, [1909] 3 Crim. App. 255, 256 (The defendant answered the following question about the prosecutor: "Then you say he is not telling the truth?"—"He is not"; held, door not open). Further protection for an English defendant was provided by *Rex v. Sweet-Escott*, [1971] 55 Crim. App. 316, where the court held that judges must exclude prior convictions that are too remote to be probative of present credibility; a twenty-year-old conviction was too remote. This case is interesting because the defendant was being tried for perjury for denying his prior convictions when asked about them at a previous trial in which he was a prosecution witness; because the conviction evidence was improper at that trial, it could not form the basis for a perjury charge.

23. FED. R. EVID. 609(a): "General rule—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . ."

The House Committee worried so much about defendants that it proposed to limit

Hawaii Supreme Court reached the conclusion that "to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused's constitutional right to testify in his own defense."[24]

Most American jurisdictions have avoided the problem of special protections for defendant-witnesses, since they provide extensive protections for all witnesses by permitting only a limited use of convictions for impeachment.[25] The jurisprudence generally prohibits cross-examiners from going beyond the fact, kind, and date of the convictions[26] except under special circumstances, such as where the witness has volunteered

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convictions against any witness to veracity crimes only: "because of the danger of unfair prejudice in such practice and the deterrent effect upon the accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior convictions should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement." H.R. REP. No. 93-649, 93d Cong., 1st Sess. 11 (1973). The Senate Committee amended the House version to protect the defendant from impeachment by convictions not involving dishonesty or false statement and proposed that felonies be used against ordinary witnesses "if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness." S. REP. No. 93-127, 93d Cong., 2d Sess. 14 (1974). The Conference amended the Senate version and adopted the present rule that felonies can be used against any witness, but with the safeguard that prejudice against the defendant must be considered: "[T]he Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specially the prejudicial effect *to the defendant.*" H.R. REP. No. 93-1597, 93d Cong., 2d Sess. 9 (1974).

24. State v. Santiago, 53 Haw. 254, 260, 492 P.2d 657, 661 (1971).

25. C. MCCORMICK, *supra* note 11, at 88 ("On the whole . . . the more reasonable practice, minimizing prejudice and distraction from the issues, is the generally prevailing one that beyond the name of the crime, the time and place of conviction, and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into."). See note 26, *infra.*

26. Fulton v. State, 335 So. 2d 280, 284 (Fla. 1976) ("When there has been a prior conviction, only the fact of the conviction can be brought out, unless the witness denies the conviction . . . . If the witness denies ever having been convicted . . . counsel may impeach the witness by producing the record . . . . Even if a witness denies a prior conviction, the specific offense is identified only incidentally when the record . . . is entered into evidence."); People v. Jacobs, 45 App. Div. 2d 675, 356 N.Y.S.2d 81 (1974) (the defendant was asked how many times and in what parts of the body he stabbed his victim in a prior homicide conviction—new trial ordered).

The federal courts have similarly held that only fact, kind and date may be shown: United States v. Mitchell, 427 F.2d 644, 647 (3d Cir. 1970) ("The prosecution is limited to establishing the number of convictions, the nature of the crimes, and time and date of each . . . ."); Tucker v. United States, 409 F.2d 1291, 1294 n.1 (5th Cir. 1969) ("The law is too well settled . . . to require citation of cases . . . . He was required to give answers only as to whether he had been previously convicted of a felony, as to what the felony was and as to when the conviction was had.").

details on direct examination or has chosen to explain the circumstances of the prior offenses in an effort to mitigate the damage to his credibility.[27] Details of convictions, such as the type of weapon used in the prior crime or the bulk and age of the victim,[28] do not come in under cross-examination in most courts on the theory that counsel must not be allowed to add to the "pungency of the impeachment."[29] This rule not only protects defendants who have criminal records, but also shows sensitivity for ordinary witnesses and thereby minimizes public distaste for the witness box.[30] In England, where specific instances of conduct may be broadly inquired into on cross-examination of a non-defendant witness, the law protects a witness from the details of his misdeeds by requiring the judge to forbid questions that are vexatious, i.e., unnecessary and of doubtful relevance to present credibility.[31]

In Louisiana, under *State v. Danna*[32] and *State v. Perkins*,[33] the supreme court interpreted section 495 of title 15 of the Revised Statutes to be explicit in allowing evidence of convictions to be used to impeach a witness without permitting the details of the underlying crimes. But *Jackson I* overruled those cases, and in full recognition of the prevailing

27. United States v. Bray, 445 F.2d 178 (5th Cir. 1971) (defendant narrated some of the details of his conviction in order to extenuate his guilt, and cross-examination about details was therefore proper); Eachus v. People, 124 Colo. 404, 238 P.2d 885 (1951) (Defendant was unclear about the nature of his convictions; within the discretion of the court, the prosecutor properly brought out that two of the prior crimes were larceny); Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964) (witness has a right to offer the jury an explanation for the convictions, and it is within the judge's discretion to permit cross-examination on the details of this explanation); State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (Ct. App. 1969) (where the defendant is evasive about his convictions, the prosecutor may "freshen" his memory with details).

28. State v. Mount, 64 A. 124 (N.J. App. 1906); State v. Norgaard, 272 Minn. 48, 136 N.W. 2d 628 (1965).

29. C. MCCORMICK, *supra* note 11, at 88.

30. *See* Third Great Western Turnpike Road Co. v. Loomis, 32 N. Y. 127, 139 (1865) ("Justice to a witness demands, that the court to which he appeals for present protection shall have the power to shield him from indignity, unless the circumstances are such that he cannot fairly invoke that protection."). *See also* 3A J. WIGMORE, *supra* note 13, § 983 at 841.

31. S. PHIPSON, EVIDENCE ¶ 1552 (Argyle ed. 1963); *see also* 3A J. WIGMORE, *supra* note 13, § 984 at 852 (witness privilege against "disgracing answers"). No cases could be found regarding details of prior convictions, but considering the English concern for protecting a witness from indignity, the defendant's shield from prior conviction evidence, and the judge's power to exclude vexatious questions, it can be argued that details such as the type of weapon used or the age of the victim or how many times the victim was stabbed would not be permitted in England.

32. State v. Danna, 170 La. 775, 129 So. 154 (1930).

33. State v. Perkins, 248 La. 293, 178 So. 2d 255 (1965).

rule in other jurisdictions Louisiana has apparently become the only state to hold that a cross-examiner may delve into the details of convictions irrespective of special circumstances.[34] The court, by a narrow majority, examined Wigmore's "auxiliary policy" rules for the exclusion of past misconduct evidence,[35] finding that confusion of issues and unfair surprise were considerations inapplicable to evidence of prior convictions. As the court stated, "The record proves the conviction; unfair surprise is not a problem."[36] Thus the court determined that where a conviction is relevant to credibility, those details necessary to establish the "true nature of the offense" are permissible evidence.[37]

In the instant cases the supreme court has changed the rule permitting only fact, kind, and time[38] of the conviction to be shown by defining "kind" or "nature" of the conviction to mean the details of the criminal conduct involved.[39] For other courts, and formerly in Louisiana, "na-

34. UNDERHILL'S CRIMINAL EVIDENCE, *Impeachment of Witnesses*, § 243 at 762 (Herrick ed. 1973) (emphasis added): "[Some] jurisdictions permit certain minimum details to be asked initially. These minimum details generally include nature (name) of the crime, the time and place of conviction and the length of sentence. *No jurisdictions permit more than these minimum details unless there are special circumstances.*" *See also* cases cited in note 27, *supra.*

35. 3A J. WIGMORE, *supra* note 13, § 978 at 822: "The exclusionary doctrine is purely one of auxiliary policy . . . , i.e., it excludes certain relevant facts, when offered by outside testimony, because of objections of policy to that mode of presentation." *Id.* § 979 at 826: "These reasons of auxiliary policy are . . . reducible to two: (a) confusion of the issues . . . (b) unfair surprise . . . ."

36. 307 So. 2d at 608 (La. 1975); see text at note 16, *supra.*

37. 307 So. 2d at 608.

38. See note 27, *supra.*

39. 307 So. 2d at 608. First, the court found that evidence "of the real nature of the offense is relevant to credibility, whether the evidence tends to minimize or increase the seriousness of the offense." Then the court stated, "It is not the conviction which impeaches, but the unlawful act. The conviction simplifies proof." Following this, the court held that details are admissible.

In *State v. Jackson*, 339 So. 2d 730 (La. 1976), transcript no. 57627 at 222 *et. seq.*, the court permitted the following cross-examination of a defendant on his prior convictions:

"Q—Let's be a little more specific with these convictions . . . . Let's start out from the beginning, back in 1968. You had a trespassing conviction, didn't you?

A—Yes, sir.

Q—Okay, tell us about that trespassing.

. . . .

Q—Well, we're not getting anywhere on that one. Let's go on to the next one, the one about negligent injury. Tell us what happened there.

A—Me and a friend of mine was playing.

Q—Playing what?

A—With a pistol.

Q—Uh-huh.

ture" of the convictions means simply whether the crime is a felony, a misdemeanor, or a crime involving dishonesty. The Supreme Court of Arizona expressed the rule in this manner: "The weight of the evidence . . . depends upon the character of the crime . . . as, whether it involved moral turpitude or was merely malum prohibitum."[40] Hence, "nature" of the offense functions in most jurisdictions as an express limitation on cross-examination which stops cross-examiners from going into prejudicial or irrelevant details, whereas in Louisiana the term is presently being used to sanction such conduct.

The court in *Jackson I* based much of its reasoning on an examination of Wigmore's auxiliary policy rule for excluding relevant evidence of specific instances of misconduct and found that those courts which prohibit evidence of conviction details operate under a misunderstanding of the policy.[41] Although Wigmore did not address this precise question, the court made a fair inference that the policy rule should not apply to cross-examination of a witness on the details of his convictions. The reason for this can be found in the rationale Wigmore employed to except intrinsic evidence of specific instances of conduct from the rule—a person can be expected to know and answer inquiries about his own deeds and thus "the matter stops with question and answer."[42] Furthermore, the trial judge has discretion to prevent undesirable questions,[43] which protects the trial from confusion of issues. *Jackson I*, however, did not differentiate, as Wigmore did, between intrinsic and extrinsic proof of relevant specific instances of conduct. The case gives no guide on the

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A—And I shot him.
Q—Uh-huh, where did you shoot him?
A—In the eye.
. . . .
Q—And now what about this attempted simple rape? . . . .
A—She was a girl friend of mine.
Q—Well, give us some specifics. What did you do?
A—It was a—girl friend of mine.
Q—Uh-huh.
A—She was under age.
Q—How much under age was she?
A—She was about fifteen . . . ."

Clearly the new rule differs from fact, kind and date, and, as demonstrated by the *Jackson II* transcript, lets in evidence of prejudicial and time-wasting facts.

40. Hadley v. State, 25 Ariz. 23, 36, 212 P. 458, 462 (1923).

41. State v. Jackson, 307 So. 2d 604, 607 (La. 1975) ("The rule that the details of the crime are inadmissible has developed from a misapplication of the rules concerning all past misconduct evidence.").

42. 3A J. WIGMORE, *supra* note 13, § 981, at 838.

43. *Id.* § 983 at 847.

introduction of extrinsic proof, whether by record or by testimony, to prove a detail which a witness has falsely denied. If the case can be read to permit such a practice, it would violate Wigmore's auxiliary policy.

Elam applied the *Jackson I* holding to defendant-witnesses without discussion.[44] When the defendant takes the stand, special reasons for prohibiting the details of his convictions emerge, yet the court did not examine these factors. Wigmore's policy for excluding certain evidence of a defendant's misconduct is:

> The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of guilt of the present charge.[45]

Details of a defendant's prior crimes before a jury may be highly and unfairly prejudicial. In fact, because any evidence of a defendant's unsavory past may be prejudicial, the Louisiana jurisprudence has provided a defendant with a mantle of protection from impeachment by evidence of prior arrests, of crimes for which there has been no conviction, and of past criminal charges.[46] But after *Elam* and its progeny it is no longer correct to say that we "have zealously placed safeguards around the introduction of evidence of other convictions offered for the purpose of impeaching the credibility of a defendant."[47]

Gerard E. Wimberly, Jr.

THE TAXABILITY OF CASH MEAL ALLOWANCES: FORM PREVAILS OVER SUBSTANCE

During 1970 the taxpayer received a base salary of $8,739.38 and an additional $1,697.54 in cash meal allowances from the New Jersey Division of State Police. Paid biweekly in advance, the cash meal allowances were included with the taxpayer's salary and were separately stated and accounted for in the state's accounting system. No restrictions were

44. State v. Elam, 312 So. 2d 318, 325 (La. 1975).

45. 1 J.WIGMORE, *supra* note 13, § 194, at 646.

46. *See* State v. Perkins, 248 La. 298, 303 178 So. 2d 255, 259 (1965); *see also* LA. R.S.15:495 (Supp. 1952).

47. State v. Prieur, 277 So. 2d 126, 130 (La. 1973).